

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

American Teleservices Association, Inc.

**Petition for Declaratory Ruling with Respect to
Certain Provisions of the New Jersey Consumer
Fraud Act and the New Jersey Administrative Code**

CG Docket No. 02-278

**COMMENTS OF THE
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY**

INTRODUCTION

On or about August 23, 2004, American Teleservices Association, Inc. ("ATA"), filed a petition seeking a declaratory ruling from the Federal Communications Commission (the "Commission") preempting certain provisions of the New Jersey Do Not Call Law and the regulations promulgated thereunder. The Attorney General of the State of New Jersey (the "Attorney General") has filed a motion to dismiss the petition. Without waiving the State's right of sovereign immunity, the Attorney General files this comment for the limited purpose of asserting the Commission's lack of jurisdiction to adjudicate the issues raised by ATA's petition. By filing this comment, the Attorney General is not submitting himself to the jurisdiction of the Commission, and expressly reserves his right to argue the merits of the dispute in an appropriate forum. The Attorney General respectfully submits that the Eleventh Amendment bars the Commission from considering the petition, which was brought by a private party against a sovereign State. In addition, the Telephone Consumer Protection Act ("TCPA")¹ does not confer jurisdiction on the Commission to determine whether and to what extent a state law is preempted by federal statute or regulation. Accordingly, the Attorney General respectfully requests that the Commission dismiss the ATA's petition without further comment or consideration.

¹ 47 U.S.C. § 227 (2001).

STATEMENT OF FACTS

On May 17, 2004, regulations implementing provisions of the New Jersey Do Not Call Law were published in the *New Jersey Register*. No party has filed an appeal based on the adoption of the regulations. To date, neither the New Jersey Division of Consumer Affairs, the agency charged with the oversight of the Consumer Fraud Act, of which the Do Not Call Law is a part, nor the Attorney General has brought an enforcement action for violation of the New Jersey Do Not Call Law or the regulations promulgated thereunder.

On or about September 7, 2004, the Attorney General and the Director of the Division of Consumer Affairs received, by regular mail, "courtesy copies" of the petition filed by ATA with the Commission. The petition purports to seek a declaratory ruling preempting various provisions of the New Jersey law and regulations as they apply to certain communications. As noted above, ATA did not file an appeal from the regulations when they were published, nor has it been named as a party in any enforcement action brought by the Division of Consumer Affairs or the Attorney General.

On October 18, 2004, the Commission published the petition in the *Federal Register*, seeking public comment on ATA's petition. Accordingly, the Attorney General now submits this comment for the sole purpose of asserting the Commission's lack of jurisdiction to adjudicate ATA's petition, and expressly reserves his right to address the merits of the dispute at a later date in an appropriate forum.

DISCUSSION

I. SOVEREIGN IMMUNITY BARS THE COMMISSION FROM ISSUING A DECLARATORY RULING ON ATA'S PETITION

ATA's petition seeks a declaratory ruling preempting certain provisions of the New Jersey Do Not Call law and the regulations promulgated thereunder. Although the petition has been noticed for comment and will not be heard before an Administrative Law Judge as part of a more typical adjudicative proceeding, the Attorney General submits that the declaratory ruling sought by ATA is nonetheless an adjudicative proceeding. Evaluation of the petition requires the Commission to interpret not only the TCPA and its regulations, but also provisions of New Jersey law that have not yet been enforced or interpreted by New Jersey State or federal courts. The resulting declaratory ruling, if favorable to ATA, would arguably have the effect of invalidating parts of the New Jersey law as it applies to certain communications, thus constituting an adjudication on the merits of a preemption challenge. The Eleventh Amendment's fundamental principle of sovereign immunity bars a private party from filing a petition for an adjudication before an administrative agency that would result in a ruling adverse to the State.

The primary purpose of sovereign immunity is to afford States, including their agencies and their officials,² the dignity consistent with their status as sovereign entities.³ The Eleventh Amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.⁴

² *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

³ *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002) (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

⁴ U.S. Const. amend. XI.

The Supreme Court has interpreted the Eleventh Amendment to confirm the fundamental principle that each State is a sovereign entity in the federal system, consequently limiting the judicial authority of the federal courts.⁵ The Court has held that an unconsenting State is immune from suit in federal court by her own citizens as well as citizens of other States.⁶ The Court has further expanded its understanding of the concept of sovereign immunity and held that Congress may not abrogate a State's sovereign immunity when acting pursuant to its Article I powers.⁷

In *Federal Maritime Commission v. South Carolina State Ports Authority*,⁸ the Court considered whether the Framers of the Constitution, who found an "impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts" would similarly find it offensive for a non-consenting State to be brought before a federal administrative agency for an adjudication.⁹ The Court concluded that "[t]he affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court," and that sovereign immunity therefore would apply to administrative adjudications.¹⁰

The petition filed by ATA presents precisely the type of affront to New Jersey's dignity that the Eleventh Amendment has been deemed to bar. The petition, filed by a private entity, seeks to invalidate certain provisions of New Jersey law. The Commission is therefore being placed in the position of an adjudicator or judge, of necessity interpreting both State and federal law and making a declaration as to their validity. That the Commission's declaration would need to be enforced by

⁵ *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

⁶ *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

⁷ *Seminole Tribe*, 517 U.S. 44 (1996).

⁸ 535 U.S. 743 (2002).

⁹ *Id.* at 760.

¹⁰ *Id.*

a court of law does not alter the applicability of sovereign immunity.¹¹ New Jersey is still being compelled to defend those provisions before the Commission, lest the Commission issue an adverse ruling that may result in a de facto invalidation of State law as it applies to certain communications.

The federalism concerns that underlie States' immunity are jeopardized whenever an individual is permitted to file a complaint against a State that triggers a process that may result in a ruling awarding some form of relief against a State and in favor of an individual. Sovereign immunity may properly be invoked to prevent such an affront to the State's dignity.

The Court has recognized several exceptions to the doctrine of sovereign immunity: first, where Congress has enacted legislation pursuant to the remedial provisions of the Fourteenth Amendment;¹² second, where a state waives its sovereign immunity by consenting to suit;¹³ and third, where a private party sues a state officer for prospective injunctive or declaratory relief from an on-going violation of the Constitution or federal law.¹⁴ None of these exceptions apply in the instant matter. As to the first exception, the TCPA was not enacted by Congress pursuant to the remedial provisions of the Fourteenth Amendment, and so that exception is inapplicable. Second, New Jersey has not waived its sovereign immunity by consenting to suit, or by availing itself of either a federal court's or the Commission's jurisdiction. In order for a State to waive its sovereign immunity, there must be a "clear declaration" of the State's intent to submit to federal jurisdiction;¹⁵

¹¹ *Id.* at 761-62.

¹² *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

¹³ *Alden v. Maine*, 527 U.S. 706 (1999).

¹⁴ *Ex parte Young*, 209 U.S. 123 (1908).

¹⁵ *Xechem International v. University of Texas M.D. Anderson Cancer Center*, 382 F.3d 1324, 1330 (Fed. Cir. 2004) (citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675 (1999) quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

the waiver must be clear, explicit and voluntary, and may not be imposed upon the State.¹⁶ In this instance, New Jersey is not waiving its sovereign immunity, but rather is expressly invoking it.

Finally, ATA's petition does not seek injunctive relief against a State official for violation of the Constitution or federal law; rather, it seeks to preempt or invalidate various provisions of New Jersey law. Indeed, ATA cannot assert an ongoing or even prospective violation of federal law. The ATA is not a party to an enforcement action in New Jersey taken by the Division of Consumer Affairs or the Attorney General. To date, New Jersey has not yet sought to enforce any provision of the TCPA or the New Jersey Do Not Call Law against the ATA or any of its members. Upon enforcement, it will be clear that the effect of New Jersey law is consistent with the requirements of the TCPA and other applicable federal law with respect to interstate communications. Thus, at best, ATA is premature in its assertion that the New Jersey law is preempted, and is raising the issue in an improper forum.

Indeed, if the ATA intended to challenge New Jersey's regulations as being preempted or otherwise in violation of federal law, its opportunity to do so was by filing an appeal in the Appellate Division of the New Jersey Superior Court following the publication of the adoption of the regulations.¹⁷ In such an appeal, ATA would have the opportunity to raise all of its claims in State court, which has the jurisdiction to consider a preemption challenge. Dismissal or denial of the petition by the Commission would not constitute a denial of due process to the ATA, as it chose not to afford itself of the process that was available to it in the proper forum to resolve any and all disputed issues concerning the law and the promulgated regulations. Even if the State forum might be "less convenient", or might arguably undermine some concept of federal uniformity, sovereign immunity still bars consideration by the Commission of the ATA's petition for a declaratory ruling

¹⁶ *Id.* at 1331.

¹⁷ N.J. Court Rules R.2:2-3(a)(2) (appeal as of right to the Appellate Division to review the validity of any rule promulgated by a State administrative agency).

in this matter.¹⁸ Should a future enforcement action be brought against ATA or any of its members, the court in which that action is brought would be the proper forum for ATA to raise any preemption arguments with respect to the Do Not Call Law or regulations.

II. THE COMMISSION HAS NO SUBJECT MATTER JURISDICTION TO ADJUDICATE THIS DISPUTE

The TCPA provides the framework for the Commission's authority relating to restrictions on the use of telephone equipment for unsolicited advertisements and telephone solicitations. The Commission, among other things, is empowered to enact regulations to implement procedures to protect consumers' privacy rights and to establish and operate a national database of consumers who object to receiving telephone solicitations.¹⁹ Jurisdiction is vested in State courts for private rights of action brought under the TCPA²⁰ and exclusive jurisdiction is vested in the federal courts for any actions brought by States pursuant to the TCPA.²¹

The terms of the TCPA contemplate private rights of action by private parties aggrieved by telemarketers who solicit in violation of the law. In addition, the TCPA contemplates actions by State Attorneys General who seek to enforce provisions of State statutes, in State courts, or provisions of the TCPA, in federal court. Nowhere in the TCPA is there a provision permitting the Commission to act as an adjudicative body to resolve disputes concerning the preemption of State laws by the TCPA or the Commission's regulations.

¹⁸ *Xechem*, 382 F.3d at 1332 (citing *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 644-45 (1999))(sovereign immunity applied to bar suit to correct inventorship on patent; court rejected claims that State court remedies might be less convenient or undermine uniformity of patent law).

¹⁹ 47 U.S.C. § 227(b)(2) & (c).

²⁰ *Id.* at § 227(b)(3) & (c)(5).

²¹ *Id.* at § 227(f)(2).

Section 252 of the Telecommunications Act, cited by ATA as a basis for the Commission's jurisdiction over this matter, is inapposite. Sections 251 and 252 are the "Development of Competitive Markets" provisions that set forth a framework designed to spur competition in local telephone markets.²² The sections include a specific grant of authority to the Commission to, among other things, conduct arbitrations if a State commission declines to mediate issues between an incumbent local exchange carrier and a new entrant to the market. Subsection 252(e)(5) specifically directs the Commission to issue an order preempting the State commission's jurisdiction of the proceeding or matter within 90 days of the State commission's failure to mediate the dispute between the parties. Thus, the statute provides for a specific direction to the Commission to preempt a State action: a direction that is absent from the TCPA.²³ Most importantly, however, section 252 is limited in scope to arbitrations for the purpose of developing competitive markets. There is no basis in law or fact to expand the scope of the Commission's jurisdiction to permit it to resolve alleged conflicts between the TCPA and State law.

Assuming that ATA intended to assert the Commission's jurisdiction pursuant to the more general provisions of the Telecommunications Act, 47 U.S.C. § 152, it is similarly inapplicable. Section 152 is a general statute that sets forth the scope of the Telecommunications Act, as well as setting forth exceptions to the Commission's jurisdiction. Section 227 of the TCPA is specifically excluded from the exceptions provision.²⁴ Although section 152 makes clear that the Commission has the ability to regulate within the telecommunications industry, there is nothing in that section that

²² *Bell Atlantic-Delaware v. McMahon*, 80 F. Supp. 2d 218, 222 (D. Del. 2000)(citing S. Conf. Rep. No. 104-230, at 113 (1996)).

²³ See also 47 U.S.C. § 253, concerning barriers to entry of telecommunications providers. The section contains language setting forth the scope of State authority to regulate certain aspects of telecommunications service, while also expressly directing the Commission to preempt, to the extent necessary, the enforcement of certain State or local statutes, regulations or legal requirements. There is no similar express direction in the TCPA.

²⁴ 47 U.S.C. § 152(b).

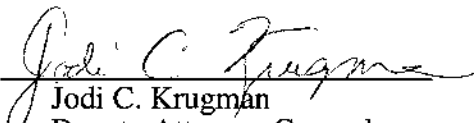
conveys the authority for the Commission to act as an adjudicator and review State law to determine its validity.

CONCLUSION

The Attorney General respectfully asserts that because of the application of the fundamental principle of sovereign immunity, and also because the Commission lacks statutory authority to act in an adjudicative role, ATA's petition should be dismissed without further comment or action by the Commission.

Respectfully submitted,

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Dated: November 17, 2004